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INVOLUNTARY INTOXICATION: A NEW SIX-STEP PROCEDURE

Thom Brooks

Abstract. Involuntary intoxication is often misunderstood. The predominant ‘orthodox’ view is that involuntary intoxication should lead to acquittal for offences requiring proof of fault. Strict liability offences are therefore unaffected. This article argues the law is more complex requiring a more careful approach. The article provides a new six-step procedure to determine whether involuntary intoxication is applicable and should lead to acquittal.

INTRODUCTION

Involuntary intoxication is often misunderstood. The predominant ‘orthodox’ view is that involuntary intoxication should lead to acquittal for offences requiring proof of fault. Strict liability offences are therefore unaffected. This article argues the law is more complex requiring a more careful approach. The article provides a new six-step procedure to determine whether involuntary intoxication is applicable and should lead to acquittal. Additionally, it recommends a new seventh step concerning duress.

The orthodox view of involuntary intoxication is that normally D should be acquitted for offences requiring proof of fault when involuntarily intoxicated.¹ This is because D would lack the required *mens rea*. Involuntary intoxication provides evidence for a complete defence for crimes of specific or basic intent where D lacks *mens rea*. For example, David Ormerod argues: ‘The offence has not been committed and there is absolutely no reason why the law should pretend that it has’.²

This view of involuntary intoxication is also found in the Law Commission Report *Intoxication and Criminal Liability*.³ It provides the illustration that if ‘D throws a brick at V

¹ D. Ormerod, *Smith and Hogan’s Criminal Law*, 13th edn, (Oxford: Oxford University Press, 2011), p. 313. See *Pearson’s Case* [1835] 2 Lew. 144, 145 (‘If a party be made drunk by stratagem, or the fraud of another, he is not responsible’) and for criticism of *Pearson* see Mustill LJ in *R v Kingston* [1995] 2 AC 355, 367 (‘I cannot place reliance on this dictum as a foundation for a modern law of involuntary intoxication’ after citing *Pearson*).

² Ibid citing Law Commission Report No. 314, para 1.22. See also Q. Haque and I. Cumming, ‘Intoxication and Legal Defences’, *Advances in Psychiatric Treatment* 9 (2003): 144 - 51, at 146.

³ Law Commission Report No. 314 *Intoxication and Criminal Liability* (TSO, London, 2009).

without any appreciation of the risk that V would thereby apprehend or experience an impact' after D is involuntarily intoxicated, then D is not liable for any offences because D lacks the relevant subjective fault element.⁴ D has evidence for a complete defence due to his involuntary intoxication.

However, D does not have a complete defence, but rather *evidence* to support a complete defence. Simester correctly argues:

'Intoxication, even involuntary intoxication, will never provide a defence in its own terms. It is never enough to claim, however convincingly, that the offending behaviour in issue would not have occurred but for one's intoxicated condition'.⁵

Involuntary intoxication can provide an evidential basis for the claim that D lacks *mens rea*. While not a defence, involuntary intoxication would provide evidence against convicting D for offences requiring fault. This is because D would lack *mens rea* or as potential evidence for an automatism defence where involuntary intoxication is an external factor that causes (non-insane) automatism.⁶ Involuntary intoxication cannot provide a full defence by itself, but its finding can help to establish a full defence, such as automatism.⁷ The orthodox view stated in summary is this: D should be acquitted for offences requiring proof of fault because the evidence of involuntary intoxication confirms a lack of *mens rea*.⁸

⁴ See above at p. 38.

⁵ AP Simester, JR Spencer, GR Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 4th ed. (Oxford: Hart, 2010), p. 686. See further AP Simester, 'Intoxication is Never a Defence', *Criminal Law Review* 3 [2009].

⁶ Law Commission Report No. 314, p. 6. For a perspective from Scots Law, see JM Ross, 'A Long Motor Run on a Dark Night: Reconstructing *HM Advocate v Ritchie*', *Edinburgh Law Review* 193 (2010). For suggestions that involuntary intoxication is a defence, see C. Crosby, 'Culpability, *Kingston* and the Law Commission', *Journal of Criminal Law* 434, 468 (2010).

⁷ Law Commission Report No. 314, p. 7.

⁸ Ormerod, *Smith and Hogan's Criminal Law*, p. 328 ('The resulting intoxication is involuntary, so D should be acquitted'). D is acquitted not because she is involuntarily intoxicated, but rather because the required fault element she cannot possess due to involuntary intoxication. D should be acquitted in these circumstances because of a lack of the required *mens rea* and not, strictly speaking, merely because D is involuntarily

The problem with this view is that it does not capture the relevant legal complexity contributing to a mistaken understanding about involuntary intoxication and its possible implications for D. Involuntary intoxication is not a recognised defence and its finding cannot guarantee an absence of liability for every charge. Additionally, its narrow interpretation is subject to confirmation of involuntary intoxication in law that has escaped satisfactory recognition.

The six-step procedure proposed below demonstrates how the orthodox view of the current law should be revised and sharpened. The reasoning process by which it might be concluded that D is not guilty because of involuntary intoxication has been oversimplified. The six-step procedure is an attempt to provide clarity to the present law.⁹

SIX-STEP PROCEDURE

Involuntary intoxication is understood narrowly and subject to an evidential burden. The Law Commission has noted its concerns about the ‘uncertainty’ over the ‘demarcation’ between involuntary and voluntary intoxication.¹⁰ This distinction matters: it is important that any finding of involuntary intoxication is clarified even if such are relatively few because of the scale and potential seriousness of relevant alcohol-related offences.¹¹

intoxicated although the latter may often be evidence for the former. This is not always clear. See *R v Kingston* [1995] 2 AC 355.

⁹ See A Reed and N Wake, ‘Potentiate Liability and Preventing Fault Attribution: The Intoxicated “Offender” and Anglo-American Depeçage Standardisations’, 47 *John Marshall Law Review* 57 (2014) for an insightful examination of voluntary and involuntary intoxication.

¹⁰ Law Commission Report No. 314, p. 2.

¹¹ For example, there were 844,000 violent incidents recorded in the 2012/13 Crime Survey for England and Wales where the victim believed the offender(s) to be under the influence of alcohol. This accounts for nearly half (49%) of all violent offences committed that year. See Office for National Statistics, *Crime Statistics: Nature of Crime tables 2012/13 – Violence*, table 3.10, url: <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/nature-of-crime-tables--2011-12/index.html>. See HM Government, *The Government’s Alcohol Strategy* (TSO, London, 2012), esp. pp. 6 - 9, 12 - 13.

The burden of proof normally rests with D.¹² Section 6(5) of the Public Order Act 1986 states:

‘a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment’.¹³

D must ‘show’ and need not ‘prove’ involuntary intoxication.¹⁴ ‘Intoxicants’ are construed broadly and include alcohol, controlled substances (e.g., Librium and Valium) and illegal drugs (e.g., cannabis and LSD).¹⁵

The narrow construction of involuntary intoxication in law requires that we apply an implicit, six-step procedure to determine its applicability to the facts of a case. Each step should be considered in the following order. Steps are labelled as a short-hand for the key element in each part. This six-step procedure is designed to provide greater clarity about the applicability of involuntary intoxication to overcome ‘uncertainty’ over its use.¹⁶ While relatively rare in practice, surprisingly no similar approach has been defended to clarify its applicability in law.¹⁷

This procedure follows a specific order: the potential relevance of the proper medical use of an intoxicant is applicable for determining involuntary intoxication only where previous steps have been addressed. The requirements of the offence type help determine

¹² See Law Commission recommendation that D should be presumed non-intoxicated and so D should have evidential burden. Law Commission Report No. 314, p. 81.

¹³ S6(5) of the Public Order Act 1986.

¹⁴ Ormerod, *Smith and Hogan’s Criminal Law*, p. 314 argues this gives force to Art 6(2) of the ECHR under the Human Rights Act 1998. See Law Commission Report No. 314, p. 83.

¹⁵ See Law Commission Report 314, pp. 24-25 (‘Intoxication is not just about alcohol; it encompasses ingestion of any intoxicating substance. This includes all drugs, whether prohibited, available on prescription or freely available’).

¹⁶ See Law Commission Report No. 314, p. 2.

¹⁷ See above.

whether further steps should be considered. Each step should be considered in the order presented here to determine involuntary intoxication.

First Step – Offence Type

The first step is to consider whether an offence requires proof of specific or basic intent. If affirmative, then we proceed to the second step. If not, then involuntary intoxication is inapplicable.¹⁸ Therefore, involuntary intoxication is irrelevant to whether D is liable for a strict liability offence.¹⁹ Involuntary intoxication can provide evidence that D lacks *mens rea*, but this is irrelevant when considering offences that lack proof of specific or basic intent. Involuntary intoxication can only be applicable for offences that require proof of fault. The first step is to confirm whether or not this is present.

Second Step – Mental Functioning

The second step is to consider next whether D suffers from a ‘disease of the mind’ within the M’Naughten²⁰ Rules, such as a recognized medical condition.²¹ If affirmative, then involuntary intoxication is inapplicable although alternative defences may be available, such as insanity.²² We should proceed to the third step if this is not the case.

¹⁸ An exception is where involuntary intoxication induces a state of automatism. D would have the defence of non-sane automatism. But see Reed and Wake, ‘Potentiate Liability and Preventing Fault Attribution’, at 77 (‘The boundaries between automatism / involuntary intoxication are blurred’ in certain respects).

¹⁹ *R v Kingston* [1995] 2 AC 355, 370.

²⁰ *R v McNaughten* [1843] 10 Cl. & F. 200, 210. See *DPP v Beard* [1920] AC 479, 501; *Attorney-General for Northern Ireland v. Gallagher* [1963] AC 349 and *R v C* [2013] EWCrim 223, para. 18 (the ‘precise line between the law of voluntary intoxication and the law of insanity may be difficult to identify in some borderline cases’). For general commentary, see T. Storey, ‘The Borderline between Insanity and Intoxication’, *Journal of Criminal Law* 194.

²¹ See s. 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requiring expert medical evidence to support insanity claims. See also *Winterwerp v Netherlands* [1979] 2 EHRR 387 and *Dowds* [2012] EWCA Crim 281, [2012] 1 WLR 2576 at [40] (‘The presence of a “recognised medical condition” is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility’). See also *Dowds* [2012] 1 WLR 2576 at [31] (‘the medical classification begs the question whether the condition is simply a description of (often criminal) behaviour, or is capable of forming a defence to an allegation of such’).

²² See *Burns* [1984] 79 Cr. App. R. 173 (CA). See also Law Commission, *Criminal Liability: Insanity and Automatism. Discussion Paper* (2013), 1.86 and also Reed and Wake, ‘Potentiate Liability and Preventing Fault Attribution’, at 83 – 99..

Relevant recognized medical conditions include alcohol dependency syndrome where it affects D's ability to reason at the time the *actus reus* of an offence was committed.²³ D could be incapable of forming the required *mens rea*, but the cause would be an internal factor due to a disease of the mind and so D could not claim (non-insane) automatism.²⁴ This is the case even where D's insanity is only temporary and caused voluntarily, explained by Mr Justice Stephen in *Davis*: 'drunkenness is one thing and the diseases to which drunkenness leads are different things'.²⁵ The question about D's mental functioning in relation to the M'Naughten Rules is relevant after we confirm that the offence in question requires proof of fault in the first step.²⁶ The second step concerning mental functioning affirms whether D lacks a recognised medical condition. This is required if involuntary intoxication is a possibility.

Third Step - Chronology

The third step is to consider whether D possessed *mens rea* before becoming involuntarily intoxicated. Involuntary intoxication is inapplicable if D does possess *mens rea*. If this is not the case, then we should consider the fourth step.

The relevant chronology is important. Involuntary intoxication may render D unable to form *mens rea*, but it is no defence where *mens rea* is present prior to involuntary

²³ See *DPP v Beard* [1920] AC 479, 500 to 501; *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349, 375 and 381; *R v Kingston* [1995] 2 AC 355, 369 and *R v C* [2013] EWCA Crim 223 at [17].

²⁴ *Bratty v Attorney General of Northern Ireland* [1963] AC 386; *R v Sullivan* [1983] 3 WLR 123; *R v Hennessey* [1989] 1 WLR 287. For criticisms about the internal versus external factors distinction, see J. Peay, 'Insanity and Automatism: Questions From and About the Law Commission's Scoping Paper', *Criminal Law Review* 927, 930 - 32 (2012).

²⁵ (1881) 14 Cox's Criminal Cases 563, 564 cited in Law Commission Report No. 314, p. 74. See Lord Birkenhead LC in *Beard* [1920] AC 479.

²⁶ *DPP v Harper*, *The Times*, May 2, 1997. See 'Case Comment: Driving without Due Care and Attention – Diabetic', *Criminal Law Review* 271 (1987). For criticisms of *Harper*, see T. Ward, 'Magistrates, Insanity and the Common Law', *Criminal Law Review* 796 (1997).

intoxication.²⁷ This is because involuntary intoxication might prevent D forming *mens rea* post-intoxication, but it does not terminate any *mens rea* already possessed.

The question is whether ‘the operative fault’ is possessed by D and it would not be if D formed the intention after involuntary intoxication.²⁸ If D possessed *mens rea* before becoming surreptitiously intoxicated by another, then the operative fault lies with D and the necessary fault element remains.²⁹ D could not claim involuntary intoxication even though she may lack responsibility for becoming intoxicated. Involuntary intoxication requires that *mens rea* is not possessed prior to intoxication and any intent formed after intoxication is not the operative fault of D. The third step confirms this chronology.

Fourth Step – Proper Medical Purpose

The fourth step is to confirm whether the taking of an intoxicant by D is for a proper medical purpose. If affirmative, then D is involuntarily intoxicated in law thereby possessing evidential support for a defence of (non-insane) automatism. Proper medical purpose would include taking an intoxicant on instruction by a medical professional.³⁰ Medically prescribed intoxicants must be taken as instructed.³¹ D would be involuntarily intoxicated because intoxication is by directed instruction from a medical professional. Improper medical purposes might negate involuntary intoxication, such as taking an intoxicant prescribed to another or failing to take the correct dosage. This finding requires each preceding step is

²⁷ *R v Kingston* [1995] 2 AC 355, [1994] 3 WLR 519. See GR Sullivan, ‘Making Excuses’, in A. Smith and G. Sullivan (eds), *Harm and Culpability* 131-34 (Oxford University Press, 1996).

²⁸ See Lord Taylor of Gosforth in *R v Kingston* [1994] QB 81, 89-90 cited by Mustill LJ in *Kingston* [1995] 2 AC 355, 362-63.

²⁹ See Law Commission Report No. 314, p. 7 note 33.

³⁰ *DPP v Majewski* [1977] AC 443, 471 - 72, 475. See *Quick* [1973] QB 910, 922 - 23. The Law Commission recommends this should be understood more narrowly and limited to where D takes ‘a properly authorised or licensed medicine or drug (for a proper medical purpose) in accordance with: (1) advice given by a suitably qualified person (such as a general practitioner or pharmacist; and/or (2) the instructions accompanying the medicine or drug (such as a printed leaflet)’. Law Commission Report No. 314, p. 79.

³¹ *R v C* [2013] EWC Crim 223, paras. 19, 31.

satisfied: the offence type requires proof of specific or basic intent, D does not suffer from a disease of the mind and D did not possess *mens rea* before intoxication.

This fourth step concerns whether D took an intoxicant for a proper medical purpose. If D did not, then we should proceed to consider a fifth step. D may be found involuntarily intoxicated, but this requires further consideration.

Fifth Step - Knowledge

The fifth step is to consider whether D was aware he took an intoxicant prior to involuntary intoxication. D is involuntarily intoxicated if he is not and this provides evidential support for a defence of (non-insane) automatism. This conclusion requires each of the previous steps has been passed, e.g., the offence requires proof of specific or basic intent, D does not suffer a disease of the mind, D does not possess *mens rea* before intoxication and D's taking of an intoxicant was not subject to its proper medical purpose.

Self-induced intoxication is normally held to be voluntary intoxication.³² D is involuntarily intoxicated when D lacks awareness of taking an intoxicant. D would not be involuntarily intoxicated if he had knowledge of taking an intoxicant: this is the case even if the intoxicant had been spiked to render it more potent.³³

If D was aware of taking an intoxicant, then we proceed to a final, sixth step to determine if D is involuntarily intoxicated. Knowledge of taking an intoxicant may not negate fault because 'a drunken intent is nevertheless an intent'³⁴ and even where involuntarily taken.³⁵ Lord Hughes states in *C* that

³² *R v Quick* [1973] QB 910. See also at 922 ('A self-induced incapacity will not usually excuse nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin').

³³ *R v Allen* [1988] *Criminal Law Review* 698.

³⁴ *R v Sheehan* [1975] 1 WLR 739 and *R v Heard* [2007] 3 All ER 306.

³⁵ See JR Spencer, 'Involuntary Intoxication as a Defence', 54 *Cambridge Law Journal* 12 (1995).

‘The law refuses as a matter of policy to afford a general defence to an offender on the basis of his own voluntary intoxication. The pressing social reasons for maintaining this general policy of the law are certainly no less present in modern conditions of substance abuse than they were in the past’.³⁶

If D is found voluntarily intoxicated, then there would be no evidential basis for a complete defence of (non-insanity) automatism. Intoxication might still be a defence to crimes of specific intent.³⁷ This is because automatism is incompatible with voluntariness. If intoxication is self-induced knowingly, then D will normally be considered voluntarily, not involuntarily, intoxicated.³⁸ This is explained by the Law Commission: ‘The policy for this is readily understood: while it may be fair for a person to be acquitted where he or she completely lost control of his or her actions, it is not fair for there to be an acquittal where the accused may be blamed for whatever led to the loss of control’.³⁹

It should be noted that the law on this point has attracted criticism. The Law Commission recommends an important revision where we consider the ‘self-induced aspect’ of D’s intoxication versus any unknown external factors.⁴⁰ If D consumes one alcoholic drink that she believes is a glass of wine, but unaware that this drink has been surreptitiously spiked with a powerful hallucinogenic drug the current law would find D is voluntarily intoxicated. The Law Commission revision recommends we weigh and compare what D knowingly consumes against what D does not. If the ‘self-induced aspect’ is ‘insignificant’ in contrast with an unknown external factor, then D could claim involuntary intoxication despite knowingly taking an intoxicant.⁴¹ There is also authority for this position in Scots law.⁴² The

³⁶ *R v C* [2013] EWCA Crim 233 at [17], [2013] All ER (D) 06 (Apr).

³⁷ *DPP v Majewski* [1977] AC 443. See Simester, ‘Intoxication is never a defence’, *Criminal Law Review* 4 – 5.

³⁸ See Law Commission Report No. 314, p. 6.

³⁹ Law Commission Report No. 314, p. 24.

⁴⁰ Law Commission Report No. 314, p. 78.

⁴¹ See above.

evidential burden would remain on D and this might address the concern that this could be easy to claim, but difficult to disprove.⁴³

Nonetheless, there is likely to be resistance from the government because of the—citing Lord Hughes in *C*—the ‘pressing social reasons for maintaining this general policy’.⁴⁴ Amending this policy would likely make prosecutions more difficult to secure because D could attempt a defence and render outcomes less certain. While the Law Commission has recommended reforming the automatism defence, it has resisted extending reforms to include a change of where D ‘may have become incapable of effective control of his or her actions at the time of the alleged offence’ as a result of ‘voluntary intoxication’.⁴⁵

The fifth step considers whether D was unaware of taking an intoxicant prior to involuntary intoxication and, if so, this provides evidential support for a defence of (non-insane) automatism.

Sixth Step – Risk Appreciation

The final step concerns risk appreciation. We consider whether D was able to appreciate the risks from taking an intoxicant. If D is able to appreciate the relevant risks, then D is not involuntarily intoxicated. Otherwise, D may claim involuntarily intoxication—and this test is fairly strict. Normally, D is held voluntarily intoxicated where D has knowledge of taking an intoxicant and it is irrelevant whether the amount consumed or its effect was underestimated.⁴⁶ An exception is made where D suffers an unpredictable, aberrant reaction of a particular kind.

⁴² *Ross v HM Advocate* (Scotland) [1991] SLT 564.

⁴³ For criticisms, see *Kingston* [1995] 2 ACC 355, 376 - 77.

⁴⁴ *R v C* [2013] EWCA Crim 233 at [17], [2013] All ER (D) 06 (Apr). See T. Brooks (eds), *Alcohol and Public Policy* (Routledge, 2014).

⁴⁵ Law Commission Report No. 314, p. 40.

⁴⁶ *Allen* [1988] *Criminal Law Review* 698.

This exception can take two forms. The first is ‘pathological intoxication’⁴⁷ where taking alcohol might activate latent epilepsy or other conditions. This form of intoxication is considered a form of insanity.⁴⁸ D would be held insane and not involuntarily intoxicated. This could only be where internal factors are found to be applicable to determining liability and not external factors.

An exception may also exist in a second form where ‘soporific or sedative’ drugs have been taken, such as morphine or Valium. One example is *Burns*⁴⁹ where D took morphine for a stomach complaint without a medical prescription before being convicted. D’s conviction was quashed by the Court of Appeals which held the jury should have been directed to acquit if it believed D did not appreciate that morphine was likely to produce unawareness.⁵⁰ A second example is *Hardie*⁵¹ where D took non-prescribed Valium tablets before committing acts of criminal damage. Parker LJ said:

‘There was no evidence that it was known to [D] or even generally known that the taking of Valium in the quantity taken would be liable to render a person aggressive or incapable of appreciating risks or have other side effects such that its self-administration would itself have an element of recklessness. It is true that Valium is a drug and it is true that it was taken deliberately and not taken on medical prescription, but the drug is, in our view, wholly different in kind from drugs which are likely to cause unpredictability or aggressiveness . . . [The jury] should have been directed that if they came to the conclusion that, as a result of the Valium, [D] was, at the time,

⁴⁷ See *DPP v Majewski* [1977] AC 433, 466, 468-70, 487.

⁴⁸ See R. D. Mackay, *Mental Condition Defences in the Criminal Law* 165-69 (Oxford University Press, 1995) and Simester, et al, *Simester and Sullivan’s Criminal Law*, p. 696n160. See also *DPP v Majewski* [1977] AC 433, 470.

⁴⁹ [1974] 58 Cr App R 364.

⁵⁰ See above.

⁵¹ [1985] 1 WLR 64.

unable to appreciate the risks to property and persons from his actions they should consider whether the taking of the Valium was itself reckless'.⁵²

The perception of appreciated risk was found essential to finding recklessness.⁵³ If D was able to appreciate potential risks, then D may be found reckless and unable to claim involuntary intoxication. However, if potential risks are unable to be appreciated, then D may be found involuntarily intoxicated.

The only relevant intoxicants for consideration are morphine and Valium.⁵⁴ If D is unable to appreciate potential risks of taking any other type of sedative, then there is no clear and existing authority in law for finding D involuntarily intoxicated if D's taking of this sedative was not reckless. It could be argued that other sedatives with similar known effects should be included to enable greater consistency, but there may be a more compelling counterargument to reform the law. This is because these and other intoxicants have become more widely used over the past 30 years that raise important questions about, for example, whether Valium's possible effects are not generally known.⁵⁵

DURESS: A SEVENTH STEP?

This article argues there is a six-step procedure to clarify findings of involuntary intoxication. Additional steps are unnecessary under the present law although they may be recommended for future legal reform of the law on involuntary intoxication. One recommendation worth examining is a possible seventh step of 'Duress'.

Recall that the sixth step considers whether D was able to appreciate the risks from taking an intoxicant. D is involuntarily intoxicated if not, but D is otherwise not involuntarily

⁵² *R v Hardie* [1985] 1 WLR 64, 69 - 70.

⁵³⁵³ See *Bailey* [1983] 1 WLR 760.

⁵⁴ *Burns* [1974] 58 Cr App R 364 and *Hardie* [1985] 1 WLR 64.

⁵⁵ See *R v Hardie* [1985] 1 WLR 64, 69 (Valium's effects were not 'even generally known').

intoxicated and this exhausts the legal possibility of D's being involuntarily intoxicated. It might be argued that a seventh step should be considered to consider whether D became intoxicated through a narrow construction of duress.

To be clear: this is not the current law. However, there is support for this position that can be found in other jurisdictions. For example, there is US authority in *Burrows*⁵⁶ where D killed V after V insisted he drink several bottles of beer and some whiskey.⁵⁷ If D responds reasonably to a threat by V which involves D's having become intoxicated, then a case for duress might be made. The current law requires that D's intoxication must not be self-induced if D wishes to claim the defence of duress.⁵⁸ A seventh step would require an exemption for where D is self-induced into intoxication under duress.

The arguments for this reform are that a sufficiently high threshold for any successful claim of duress might be secured. This is because six steps must be considered before taking any possible duress into account. This places real constraints on the permissible cases for consideration of involuntary intoxication by duress. Additionally, the evidential burden would remain on D which might further secure this high threshold limiting the potential number of relevant cases.

The argument against this change might include a concern that this reform could create new inconsistencies in how the law responds to claims of duress. If D would continue to be unable to claim a duress defence because of self-induced intoxication, then it might be inconsistent to permit D to claim involuntary intoxication after passing a duress step which, in turn, would then provide evidence to support a complete defence of (non-insane) automatism. Furthermore, the defence duress is not available to D for certain offences, such as murder. If D could claim involuntary intoxication after passing a duress test, then D could

⁵⁶ *Burrows v State*, 38 Ariz 99, 297 (1931) (Arizona).

⁵⁷ See Jacqueline Martin and Tony Storey, *Unlocking Criminal Law*, 3rd ed. (Oxford: Hodder & Stoughton, 2010), p. 241.

⁵⁸ See *R v Flatt* [1996] *Criminal Law Review* 576 (CA) and *R v Bowen* [1996] 2 Cr. App. R. 157, 166.

claim a defence of (non-sane) automatism which is a complete defence to murder and this is highly unlikely to win support from Parliament.⁵⁹

This article recommends this legal reform about how involuntary intoxication should be determined. One possible argument against this reform is that a seventh step of duress would apply to most, but not all, criminal offences and so its application would be inconsistent. While a new step of duress might not be applicable in determining involuntary intoxication for offences like murder, this is consistent with the limits of applying duress more generally. This new step might reform how we determine where D is involuntary intoxicated, but not by changing how we understand duress.

Additionally, a new step of duress would not render a finding of involuntary intoxication incoherent. This is because D would not be voluntarily choosing to consume an intoxicant, but only doing so under coercion. This will place a special burden on D to establish that his intoxication was a cause of duress which appears appropriate given that, if established, it could lead to an acquittal.⁶⁰

CONCLUSION

The orthodox view is that D should be acquitted for fault based offences if he is involuntarily intoxicated. This view should be revised because the law is more complex.⁶¹ The law does not generally excuse an internal cause for an irresistible impulse and so neither should it excuse such an impulse caused by external factor.⁶² The orthodox view requires revision

⁵⁹ It is worth noting that removing this exception for murder and similarly serious offences might lack sufficient public support.

⁶⁰ This article does not argue that additional steps could be recommended.

⁶¹ This complexity is compounded when we consider related issues pertaining to voluntary intoxication.

⁶² See *R v Kingston* [1995] 2 ACC 355, 367, 376-77. See Spencer, 'Involuntary Intoxication As a Defence', 13 ('The law does not recognise irresistible impulse as a defence if it arises from blameless internal causes like brain tumours or hormone imbalance, and this it can hardly recognise irresistible impulse arising from involuntary intoxication').

because it does not capture the narrow contours of the applicability of involuntary intoxication.

This article identifies a six-step procedure we should apply to determine where involuntary intoxication may be applicable. It is suggested that the law is not inconsistent (with the possible exception of the sixth step), but it has been unclear.⁶³ The six-step procedure provides a useful approach for applying the law with greater clarity and consistency. Many offences are committed under the influence of intoxicants. This raises a problem: it could be easy for D to claim involuntary intoxication and difficult for the prosecution to disprove it. This may explain the evidential burden on D to substantiate any claim by D of involuntary intoxication.⁶⁴ This burden may make involuntary intoxication more difficult to claim successfully, but this may be unproblematic in light of the facts that (a) a successful claim may justify the complete defence of (non-insane) automatism and (b) alternative defences may remain available so the narrow construction of involuntary intoxication need not close off other possibilities.

This article argues for a reform of the current law to include a new seventh step of duress. Involuntary intoxication by duress can be found in other jurisdictions and should be included here. This reform would change how we confirm whether D is involuntarily intoxicated, but not how we understand and apply duress. Nor would this reform render incoherent the idea of involuntary intoxication.

Perhaps the biggest problem of all is determining if D was involuntarily intoxicated. This article revises the orthodox view by providing a six-step procedure consistent with the

⁶³ The law might also appear counterintuitive in finding D potentially liable for most kinds of situations where D is non-voluntarily intoxicated, a perspective often expressed by non-lawyers. It might be replied that non-voluntary intoxication may justify a reduced sentence if D is convicted. See Law Commission Report No. 314, p. 88. See also at p. 91 citing Mustill, LJ in *R v Kingston* [1995] 2 AC 355, 377: 'the interplay between the wrong done to the victim, the individual characteristics and frailties of the defendant, and the pharmacological effects of whatever drug may be potentially involved can be far better recognised by a tailored choice from the continuum of sentences available to the judge'.

⁶⁴ See Law Commission Report No. 314, p. 89.

current law that makes clear the existing legal complexity and why the inclusion of a new seventh step of duress is coherent with it.⁶⁵

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